SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Supreme Court, U. S.
FILED
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No. 74-453

BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Appellants,

against

ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY and on behalf of all other persons similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK

No. 74-5054

ANNIE TAYLOR, individually and on behalf of her minor, dependent child, MARGARET TAYLOR, CHARLOTTE OTEY, individually and on behalf of her minor, dependent child, KEVIN OTEY, ROSE HURLEY, individually and on behalf of her minor children, DOREEN HURLEY, JAMIE HURLEY and JOHN HURLEY, and on behalf of all other persons similarly situated,

Petitioners,

against

ABE LAVINE, individually and in his capacity as Commissioner of the Department of Social Services of the State of New York, JAMES M. SHUART, individually and in his capacity as Commissioner of the Nassau County Department of Social Services, BARRY VAN LARE, individually and in his capacity as Acting Commissioner of the Department of Social Services of the State of New York, and LOUIS P. KURTIS, individually and in his capacity as Commissioner of the Department of Social Services of the County of Westchester,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR APPELLANTS IN NO. 74-453 AND FOR RESPONDENTS IN NO. 74-5054

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No. 74-453

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR APPELLANTS IN NO. 74-453 AND FOR RESPONDENTS IN NO. 74-5054

1. Section 352.30(d) is a valid means of assessing the shelter needs of public assistance recipients when they share dwellings with non-paying lodgers. It does not depend on any conclusive presumption in violation of the Social Security Act, related federal regulations or the Due Process Clause of the Constitution.

Appellees acknowledge that shelter is a separate "item of need" in New York and that shelter allowances are computed as separate components of public assistance benefits. Appellees' brief, p. 19; Appellants' main brief, pp. 6-7, 38.* Shelter allowances are payments of variable amounts up to scheduled monthly maximums (themselves subject to exceptions in favor of recipients) which are established on the basis of apartment size and/or assistance group size.** Appellants' main brief, pp. 7-8.

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* These forms of citation refer respectively to the Brief of Appellees in No. 74-453 and for Petitioners in No. 74-5054 and to the Brief for Appellants in No. 74-453 and for Respondents in No. 74-5054. They are used throughout this Reply Brief.

** Appellees erroneously refer to assistance group size as the exclusive basis for determining the shelter allowances to be paid and for establishing the maximums. *E.g.* Appellees' brief, pp. 20, 21, 44. 18 N.Y.C.R.R. § 352.3(a) provides that apartment size (number of rooms) shall be determinative. The local schedules adopt apartment size or assistance group size or both. Appellants' main brief, pp. 7-8; A. 526-603. Appellees' error may have resulted from their belief that the proposed statewide schedule setting forth maximums by assistance family size (A. 522-525) would be in force at the time of this Court's adjudication. See Appellants' main brief, p. 7, second footnote, projecting effective date as April 1, 1975. However, the schedule has been withdrawn effective March 22, 1975 at the request of the New York State Budget Director for further study. The Director's action was predicated, *inter alia*, on his belief that the fiscal implication of the proposed schedule remained unclear. The Director was particularly concerned that the New York City maximums would provide lower shelter allowances for recipients living in certain federally assisted middle income housing resulting in serious impairment of that federal program or the discontinuance of welfare tenancies in those projects. Housing and Urban Development Act of 1968, Pub. L. 90-448, 82 Stat. 476 (Aug. 1, 1968). There is absolutely no warrant in the record for appellees' assumption that the proposed statewide schedule "would substantially increase the shelter allowances provided to recipients." Appellees' brief, p. 20 n. 17. The withdrawal of the schedule is subject to any orders issued in *Nero* v. *Lavine*. 75 Civ. 1024 S.D.N.Y., commenced on March 2, 1975. Therein, plaintiffs seek a preliminary injunction mandating the implementation of the proposed statewide schedule to the extent only that any existing maximums are increased. The return date of the preliminary injunction is March 21, 1975. Plaintiffs in *Nero* are represented by the attorneys for the *Hurley* appellees herein.

The amount of any individual shelter allowance is determined by dividing the number of individuals who in fact share a given dwelling into the total cost of that dwelling. Public assistance shelter payments are then provided for the "compensable" shares, or for the recipients' needs as distinguished from those of the other individuals who also live there, in relation to the actual or maximum allowed rent for the entire dwelling, i.e., the "regular shelter allowance" under § 352.30(d).*

In addition to the specific purposes of preventing public shelter subsidies for lodgers who have not qualified for assistance, conserving public assistance funds for those who are truly needy, and requiring all those who obtain the benefit of such assistance to qualify under uniform standards and bear the same obligations of repayment, § 352.30(d) read with 18 N.Y.C.R.R. §§ 352.3(a) and 352.3(c) reflects the state policy of determining individual shelter needs in light of actual living arrangements with the result that no New York recipient's shelter need can equal the entire cost of the dwelling in which he resides unless he is the exclusive occupant of the dwelling.**

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* Given that the shelter needs of New York recipients are met with individualized, variable amounts up to scheduled maximums (and exceptions thereto), the recipient's shelter cost or shelter allowance cannot be viewed as a percentage of "income." Compare appellees' brief, p. 19 and testimony of Paul Davidoff, A. 323-324. Unlike individuals who do not receive public assistance and who must therefore allocate whatever portion of their income is necessary to meet their shelter needs, the New York welfare recipient receives both a fixed "flat" grant for food, clothing and incidentals and the variable shelter allowance. Thus, the latter allowance may increase (within the maximums and exceptions) depending on changes in living arrangements and/or actual cost without invading the assistance provided for other needs.

** That a recipient may enter into a lease with the landlord does not affect the amount of the shelter allowance he is entitled to receive. Compare appellees' brief, pp. 20, 44, 84. Thus the fact that appellee Taylor had signed a lease establishing the rent on the apartment in which she resided with her minor child and sister,

(*footnote continued on following page*)

When a lodger is added to the dwelling, the shelter needs of the other individuals living there are in fact diminished by this change in circumstance and thus their shelter allowances are properly, proportionately reduced if the individuals are recipients. The change in circumstance and the effect on the shelter needs of the particular recipients involved are established on the basis of investigation of the facts of each case and may be litigated at an adversial hearing if requested by the recipient. Appellants' main brief, pp. 38-41, 53-54, 55-57.*

(*footnote continued from preceding page*)

Virginia Taylor, at $180 per month (A. 226) did not result in appellee receiving an AFDC shelter allowance in that amount for herself alone or for herself and her minor child. Rather, appellee and her child received ⅔ of the $165 Nassau County maximum. While Virginia Taylor was on Home Relief, she received ⅓ of the local maximum even though she was not liable under the lease. When Virginia Taylor's Home Relief was discontinued and she became a non-paying lodger, the same lease was in force. Appellee and her minor child continued to receive the same two-thirds shelter allowance payment because their own needs remained at two-thirds of the allowed rent. Regardless of the lease and regardless of Virginia Taylor's status as a Home Relief recipient or as a lodger, appellee Taylor and her minor child could not "gain" Virginia Taylor's share of the allowed rent by transferring Virginia's shelter need to themselves while she remained in the dwelling. Nor could appellee and her minor child receive the maximum allowed rent for the entirety of a 2-4 room apartment accommodating 1-2 persons, $145 under the Nassau County Schedule (A. 551), since that is not how they in fact lived. Appellees' brief, pp. 8-9 mistakenly refers to appellee Taylor and her minor child as receiving "two-thirds of the maximum allowance for a family of two in Nassau County" and to Virginia Taylor as receiving "one-third of the maximum shelter allowance for a family of three". In fact, the three individuals received pro-rated thirds of $165, the Nassau maximum for an apartment of 3-4 rooms accommodating 3 persons (A. 226, 551).

* See appellees' brief, pp. 5, 33, 48, 66 and n. 54 noting that the assessment of the recipient's shelter need is one of three relevant issues to be heard and determined before shelter allowances are reduced under § 352.30(d) but erroneously contending such determinations are not in fact made under present practice. The

(*footnote continued on following page*)

So long as the lodger continues to live with the recipients, the circumstance which diminished the shelter needs of the recipients and occasioned the pro-ration of the actual or maximum allowed rent in the first instance continues to subsist. This is so regardless of whether the recipients and the lodger choose to move to a smaller dwelling or to

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(*Footnote continued from preceding page*)

second relevant issue claimed by appellees, whether or not the lodger contributes, is also determined under present practice and constitutes the basis for distinguishing between the contributing and non-paying ("non-contributing") lodger under § 352.30(d). Appellees' brief, pp. 7-8, 66. The third issue "adequacy of housing space" is relevant to the establishment of shelter allowance maximums [and is in fact considered under § 352.3(a)] and to the maintenance of a suitable home environment for the child (a subject to continuing concern and "home visits" under present practice). Contrary to appellees' suggestion at p. 66, "adequacy of housing space" is not relevant to § 352.30(d). Rather, it is the addition of the lodger to the dwelling which increases the number of shares among which the actual or allowed rent may be divided and thus proportionately diminishes the value of the each pre-existing share. The result under § 352.30(d) depends on how many individuals are meeting their shelter needs by living in the dwelling and which of those individual shelter needs are properly compensable with public funds. Notably, the fact that a lodger has joined the dwelling does not require a finding that the recipients and lodger combined need more space than the recipients previously had for themselves even though the combined group could likely obtain such "extra space" if the lodger were prepared to pay an appropriate share of the cost of a larger apartment, e.g., § 352.3(c), or if the lodger became a recipient thereby increasing the public assistance group size and/or the number of rooms for purposes of computing shelter allowance maximums (A. 660 n. 2; Defts. Ex. "B," A. 522-603). Mrs. D'Alessio's case illustrates the fact that the recipient can meet her own shelter needs plus those of the lodger with the same space previously available to the recipient alone. Prior to H.M.'s joining the dwelling, Mrs. D'Alessio used the master bedroom for herself. When H.M. moved in, he shared that bedroom with her (as well as the other rooms in the apartment) (A. 271-272) and thus met his own shelter needs (while those of Mrs. D'Alessio and her minor children continued to be met) with the same amount of space and at the same total rent. The critical difference for public assistance purposes occasioned by H.M.'s joining the dwelling is the addition of another beneficial user whose shelter need does not require a public subsidy.

a larger dwelling albeit the amount that is pro-rated and the resulting shelter allowances will likely decrease or increase depending on which choice is made. See appellees' brief, pp. 22, 30, 50.*

The residence of a non-paying lodger in a dwelling formerly occupied exclusively by recipients necessarily leaves the lodger's share unpaid. This result is entirely consistent with the obligation of the state and local social service districts to meet the shelter needs of qualified AFDC eligibles and only their needs and does not conclusively presume facts in violation of the recipients' rights under the Due Process Clause. Appellants' main brief, pp. 31-32, 32-34, Points I and III. It does not mean, as appellees urge, that the shelter needs of the recipients re-

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* That the recipients cannot "gain" the lodger's share by changing their residence is the point of the colloquy between District Judge Bauman and counsel for the appellants (A. 333-335) quoted in part in appellees' brief at p. 50. In addition to the material quoted by appellees, counsel for appellants stated in part (A. 334):

> [T]he point is that the . . . share [ ] which you are taking away reflects that share which belongs to the lodger.
>
> • • •
>
> The point is that there are other devices available to [s]ocial [s]ervices to prevent [w]elfare recipients from [creating overcrowded conditions in order to house a lodger] including taking away the children, and while [s]ocial [s]ervices believe[s] that the family is living in adequate space, it leaves the choice of the meretricious relationship, which you [Judge Bauman] point out, to the [w]elfare recipients. . . . If the man came and applied for assistance, your Honor, and he wanted to live with Mrs. Hurley or Mrs. D'Alessio, the State and the locals would say nothing about it. We don't require them to get married, we want to know that the person who is getting the benefit of a shelter allowance is in fact a needy person, and the only way we can know that is by having him come before us and demonstrating his need.
>
> Once he demonstrates that need, we don't care if he has a common law relationship with Mrs. Hurley, or Mrs. D'Alessio and we don't care if instead of a male [friend] its her son or anyone else.

main the same as they were before the lodger's arrival* or that the recipients' needs increase when they discover that the lodger will not pay his share either because he tells them he has "no available income" or because he refuses to apply the income he has to the rental "expense". Appellees' brief, pp. 27, 39-40, 62.** It does not mean an

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* Equally, given groups of equal size, the cost to the state and local districts is not the "same" for a public assistance family with a non-paying lodger as it is for a family without a lodger since the lodger is not entitled to and is not paid a public subsidy for his shelter share whereas the recipient is. The point is illustrated by the fact that were the decision of the three-judge district court to be affirmed, appellants estimate that they would be obliged to increase shelter allowance payments by approximately $6.2 million annually. This estimate is for 345,669 AFDC cases and 100,889 Home Relief cases as of December 1, 1974. The additional state and local share for the AFDC cases would be approximately $4,266,000 annually based on 20,030 cases with one or more non-paying lodgers, an average family size of 3.5 increased to 4.75 by the lodger(s), and a shelter share for the lodger(s) valued at $28.42 per month. The additional cost for the Home Relief cases would be approximately $1,968,000 annually based on 4,000 cases with one non-paying lodger, an average family size of 2 increased to 3 by the lodger, and a shelter share for the lodger valued at $41 per month. Estimates of the number of cases with non-paying lodgers, the number of lodgers per dwelling and the valuation of the lodger's shelter share are based on data gathered by N.Y.D.S.S. for *Characteristics of AFDC Families in New York State*, January 1973, published in August 1974, extrapolated for Home Relief cases and updated for the caseload on both programs as of December 1, 1974.

** Appellees' repeated references to the lodger as without any legal obligation to support the public assistance family (e.g., appellees' brief, pp. 5, 20, 25, 33) and as presumptively applying his income to the "family's shelter expense" (e.g., appellees' brief, pp. 27, 39, 62) mistake both the legal obligation and the shelter expense recognized by § 352.30(d). Concededly, the lodger has no legal obligation to support the family. However, he does have a primary legal obligation to support himself. The state and local social services districts may be viewed as having a secondary legal obligation to support the lodger under existing public assistance programs if the lodger seeks their aid and shows that he is unable to provide for himself. The only "expense" that is left uncompensated under § 352.30(d) is the lodger's expense for his own shelter

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"inevitable" or "drastic" reduction in the standard of living for those who are eligible. Appellees' brief, pp. 49, 78. Nor do any other undesirable social consequences necessarily follow. See appellee's brief, p. 15-19, 34-36, 39, 49, 56-57, 76, 78-79, 88.

The existence of the unpaid lodger's share does require the recipients and the lodger to pursue one among several alternatives available to them. First, the lodger may obtain assistance on his own behalf either on the Home Relief program or as an essential person on the AFDC program.* This is obviously the most salutary course of action available to the recipient family and truly needy lodger and is in fact encouraged by § 352.30(d). For example, Michael Otey and Virginia Taylor respectively sought and reapplied for assistance when it became apparent to them that their failure to do so would result in a share of shelter cost

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needs, not the family's expense for their own shelter needs. If one wishes to characterize the lodger, defined by § 352.30(d) as "neither applying for nor receiving public assistance," as presumptively "self-maintaining" or having "available resources" (appellees' brief, pp. 42-45), that presumption is valid. It is the "same 'presumption' that attaches to every member of our society; that he is able to pay his own way until and unless he demonstrates the contrary" (A. 658). It is rebuttable "at the lodger's initiative in the same forum in which the [recipient with whom he resides] was initially required to establish a need for aid" (A. 658).

* Appellees acknowledge the availability of aid for the lodger as an essential person under the AFDC program. Appellees' brief, pp. 13 n. 9, 55-56. While appellees are correct in stating that the essential person must be approved as such by the AFDC caretaker, they fail to point out that the essential person must also be capable of demonstrating his need for aid. 45 C.F.R. § 233.20 (a)(2)(vi); 18 N.Y.C.R.R. § 352.7(f)(i), (ii) and (iv). Appellants' main brief, Ex. "2" p. 15a; appellees' brief, *id.* In view of appellees' contention that the loss of H.M. "would have caused serious harm to the D'Alessio family" (appellees' brief, p. 77), it is difficult to understand why Mrs. D'Alessio would not approve H.M. as an essential person. Appellees' brief, p. 13 n. 9.

remaining unpaid. Indeed, rather than forcing Michael Otey from the home as appellees and the Second Circuit dissent suggest (appellees' brief, p. 76, 78 n. 60, 79), § 352.30(d) provided him with the ready motivation to apply for assistance. Having done so, he obtained the means to support himself either in a dwelling shared with his mother and brother or in his own home. He chose to reside in his own home (A. 229, 30). Upon her restoration to public assistance, Virginia Taylor was provided with the means to make the same choice. She chose to continue residing with appellee Taylor and appellee's minor child. Appellants' main brief, pp. 14-15.

Further, the needy lodger's application for assistance provides advantages for the combined recipient/lodger group. It generally increases the maximum allowed rent for the group (Defts. Ex. "B", A. 522-603; A. 660 n. 2) and enlarges the basic "flat" grant to include the additional former lodger. Social Services Law § 131-a (3), appellants' main brief, Ex. "2" pp. 11a-12a.*

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* As the above illustrations show, Professor Gans' remarks that poor people must "double up because they don't have any other alternative" since "there isn't enough money to go around" or "maintain two households" (A. 310) and must "sacrifice" in terms of the dwelling space available to them in order to help friends and relatives who cannot support themselves (A. 312-313) have no application in New York. See appellees' brief, pp. 15-17. Every New York resident in fact has the "alternative" of obtaining the means to "maintain" a "household" through public assistance. Once he obtains that assistance, he has the choice of maintaining his own household or sharing a dwelling (or all household expenses) with others without requiring a "sacrifice" from anyone. Indeed, it is appellees' position in this action which encourages sacrifices among the poor. Appellees would permanently enjoin the pro-ration provision of § 352.30(d) allowing the lodger to reside with assistance recipients rent free and thus eliminating the motivation presently provided to the needy lodger to obtain his own assistance to pay his share of shelter cost. However, if the lodger is truly destitute (as Mrs. D'Alessio claimed H. M. was), it follows that recipients are not only meeting his

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Second, the lodger may pay his share of shelter cost (as well as meeting his other needs). This is obviously the most salutary course of action for the recipients and lodger to pursue when the lodger is financially capable. It is both fair (A. 658) and mutually beneficial by reason of the operation of the income disregard provisions contained in § 352.30(d).*

The third and fourth alternatives available to the recipients and the lodger are the lodger's leaving the dwelling, resulting in an increase in the shelter needs (and the shelter allowances) of the remaining recipients (appellants' main brief, pp. 39-40, 53-54), or the lodger's continuing to reside in the dwelling, leaving one share of

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shelter needs but meeting his other needs (for food, clothing, etc.) from the flat grants provided only themselves. Thus the D'Alessios are sharing basic "flat" grants for three with a fourth person, the lodger, who is literally eating the caretaker's and children's food. On appellees' view this situation must be permitted to continue at least until the time the local social services district can establish that the children are being neglected and remove them from the home thus terminating the caretaker's eligiblity.

* Although appellees disclaim the relevance of the type of relationship that exists between the recipient and the lodger for the purpose determining the validity of pro-ration (appellees' brief, p. 66), they nonetheless adopt the view of Professor Gans that the relationship between the female caretaker and the male lodger is a "fragile" one which may be impaired or destroyed as a result of § 352.30(d) when the caretaker asks the lodger to meet his own shelter needs. Appellees' brief, pp. 18, 79; A. 314. At the same time, appellees urge that the alleged impairment of the relationships occasioned by § 352.30(d) "discourages AFDC mothers from entering into relationships of the type likely to lead to marriage and to end their family['s] dependence upon public assistance." Appellees' brief, p. 79 n. 61. Appellants find it difficult to comprehend how a relationship between a man and woman that can be destroyed by the woman's request that the man meet is own shelter needs can also result in a marriage between those same individuals that ends the dependence of the woman and her children on public assistance. See also appellants' main brief, pp. 56-58.

the shelter cost unpaid or to be met with the funds provided by recipients' basic "flat" grants. As shown above, neither of these alternatives is the favored, intended, or "inevitable" result of the operation of § 352.30(d).*

There is only one alternative which is foreclosed by the operation of the non-paying lodger provision—the recipients cannot meet the lodger's shelter needs by obtaining the entire rent or the maximum allowed rent from public funds, i.e. they cannot obtain a shelter allowance for the lodger. New York provides recipients with shelter allowances to meet the shelter needs they in fact have, i.e. in proportion to their participation in the dwelling in which they actually reside. Funds are provided exclusively for the recipients' own shelter needs; no additional amount is provided which would permit the recipient to pay for the shelter of another.** The reasons for this are twofold: the recipient's payment for the benefit of the non-paying lodger

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* As discussed at pp. 9-10 *ante*, the ultimate civil sanction for the caretaker relative who persists in housing and feeding a lodger with funds provided for her own needs and those of her children is the removal of the children from the home. Social Services Law § 358-a; 18 N.Y.C.R.R. § 450.3. Additional civil "remedies" ranging from counseling to psychiatric aid as well as restrictive payments are also available (A. 180-181 n. 13). The "more drastic alternative" of criminal prosecution is available as well against the caretaker and the lodger. Social Services Law § 145. (Appellants' main brief, Ex. "2" pp. 12a-13a). However, it is apparent that in any given case, the caretaker may be able to support the lodger as well as herself and her children from the public funds provided without seriously jeopardizing the children's interests albeit it is doubtful that she could long pursue this course of action where the lodger in fact paid nothing. To the extent she is able to do so, the state and local districts allow her to make this choice.

** There are two exceptions to this policy. First, on the contributing lodger side of § 352.30(d), funds may be provided equal to the difference between the lodger's payment and the actual cost of his share plus income disregard. Appellants' main brief, pp. 50-51. This

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is necessarily a shelter subsidy for the non-recipient which the state cannot be required to pay; and any such generosity by the recipient is not an extension of charity from his or her *own* resources (appellees' brief p. 53) but an extension of the public's resources to an unintended third party beneficiary.*

Appellees have stated that the following conditions prevail among the poor: the lower one's income, the more likely he is to share his dwelling with lodgers (Brief, pp. 16-17; A. 240-245, 300-303, 307-308); the lower one's income, the more likely he is to live in a crowded dwelling (Brief, pp. 17, 19, 63; A. 246-253, 323); and that as many as half the people who are eligible for assistance do not apply (Brief, p. 67; A. 299).** The relevance of these con-

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provision is unchallenged herein although enjoined by the three-judge court. Appellants' main brief, pp. 69-71. Second, Social Security Act 402(a)(24), 42 U.S.C. § 602(a)(24), and implementing Program Instruction APA-PI-74-8, December 21, 1973, establish an "irrebuttable presumption" that the SSI beneficiary is invisible when he shares shelter with AFDC recipents with the result that the AFDC recipients must receive shelter allowances up to the maximum for their number even if that payment meets the entire rent on the dwelling leaving no shelter cost to be paid by SSI beneficiary, or leaves the SSI beneficiary with less than a full fractional share of the cost. These provisions are not in issue herein.

* As appellees admit, shelter allowances may be used by the recipients only for shelter. Appellees' brief, p. 55 n. 45. They are to be distinguished from flat grants for food, clothing and incidentals with respect to which the recipient has the discretionary choice of allocating the money subject to the protection of the child's interest. Thus the recipient may properly leave a portion of her flat grant on the "collection plate on Sunday" (A. 180 n. 13); she may not leave the "rent money." Appellees cannot fairly argue that earmarking of shelter allowances for shelter violates the "money payment principle" while conceding the validity of federal and state restrictive payment provisions applicable when the "recipient fails to fully apply the amount allowed for shelter for that purpose." Appellees' brief, pp. 53-55.

** According to a study conducted in New York City (where approximately 70% of the welfare cases in the state are concentrated) "only a small reservoir of persons eligible for welfare . . . were not on welfare and these were mainly the aged and unrelated individuals [non-family households]." B. Bernstein,

(*footnote continued on following page*)

ditions to § 352.30(d) which pro-rates the actual or maximum allowed rent for a subsisting dwelling among recipients and non-paying lodgers living there and reduces the shelter allowances payable to the recipients every time another non-paying lodger is added remains unclear. See appellants' main brief, p. 58 noting that one of appellees' expert witness was himself unable to make the connection between § 352.30(d) and vacancy rates,* crowding,** and substandard housing.

Assuming *arguendo* the relevance of appellees' principle contentions that the poorer one is, the more likely he is to share his dwelling with one or more lodgers (or "secondary" or "unrelated" individuals, A. 245, App. 13), and that the poorer one is the more likely his dwelling is to be crowded,*** the evidence offered below failed to prove

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(*footnote continued from preceding page*)

Welfare and Income in New York City, Center for New York City Affairs, New School for Social Research, 1971, p. 32. Among family members, the problem was quite the opposite. Approximately 30,200 family members were receiving assistance who were not eligible. *Id* at p. 23. The data year for the study was 1969. See Professor Gans' testimony, A. 299.

* Accepting *arguendo* the contention that there is an "almost zero vacancy rate for low-rental housing in large parts of New York State. . . ." (appellees' brief, p. 19; A. 319, 321-322, 649), New York AFDC recipients in fact more often. In the 12 months preceding January 1, 1973, 35.4% of New York's AFDC families changed living quarters. The nationwide average for the same period was 40%. In the 12 months preceding January 1, 1972, 16.5% of New York's AFDC families changed living quarters. The nationwide average for the same period was 15%. *Findings of the 1973 AFDC Study, Part I. Demographic and Program Characteristics,* HEW Publication No. (SRS) 74—03764, June 1974, Table 12.

** Indeed, it appears that § 352.30(d) weighs against rather than in favor of "crowding." Since shelter allowances are reduced with each new non-paying lodger, the recipients cannot help but realize that it is to their advantage not to share dwellings with such individuals. In contrast, appellees' view favors "crowding" since no reduction in the allowances would occur upon the addition of the non-paying lodger thus eliminating any financial inhibition the recipients have about taking in such lodgers while encouraging lodgers to share dwellings with recipients since the lodgers would be able to live there rent free.

*** These two contentions have not been previously opposed by appellants in this Court.

that the contentions were in fact true. Appellees' brief, pp. 16, 17, 19, 63; A. 240-245, 246-253, 300-303, 307-308, 323.

The contention that the poorer one is, the more likely he is to live with one or more lodgers relies principally on the affidavit of Susan E. Smith (A. 240-242) with annexed table (A. 243) and allegedly supporting census data (A. 245).* Ms. Smith states in part (A. 241):

> This table [A. 243] clearly shows that, in general, those groups of heads of households with the lowest median income (White, Black and Puerto Rican females) and, similarly, the largest percentage of persons living on income below the poverty level, are considerably more likely to house one or more persons besides their immediate families living within their households than those in the higher income groups.

Ms. Smith's thesis is opposed at least in part by her own table which shows that White female heads of households with the highest median income (among female heads of households), $4,507 per annum, have the same number of households with lodgers (approximately 8%) as do Puerto Rican female heads of households with the lowest median income (among female heads of households), $3,109 per annum. Moreover, Ms. Smith has either misread the census data (A. 245) allegedly used to support the bar graph on the table (A. 243) (or used additional data which she did not provide to the court). Neither census Table 153 or 207 (A. 245) provides any indication of the sex or marital status of the head of the household in which the "lodger or partner" resides. Thus it is impossible to create the categories (White male, White female, etc.) Ms. Smith shows as heads of households at the base of the bar graph and equally impossible to assign any particular number of

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* Ms. Smith's graph is considered at length by Professor Gans (A. 300-302, 307-308). Professor Gans agreed with Ms. Smith's views (A. 307-308).

"lodgers or partners" to those categories from the information provided.*

The contention that the poorer one is, the more likely he is to live in a crowded dwelling relies principally on the affidavit of Gary W. Bickel (A. 246-248), the annexed table (A. 249) and graph (A. 251) and supporting census data (A. 253). Mr. Bickel's table and graph are correct insofar as the information provided therein.**

Mr. Bickel adopts the thesis that the less money a person or family has, the more crowded his dwelling is likely to be (A. 247-248). He largely omits from consideration rental units below $80 monthly because "these are generally single person units" which cannot be crowded by definition since they consist of at least one room and cannot be separated from the "grouped data". He states further that if the multi-person units below $80 monthly could be separated from the single person units, his thesis would be reenforced (A. 247 and n. 1). This statement is false. Multi-person units below $80 monthly rentals can be separated from single person units, and the data so derived shows that multi-person units at the lower levels do not become more crowded, they become less crowded. The data omitted by Mr. Bickel has been derived from

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* Ms. Smith's error appears to arise from a misreading of Table 153 (A. 245). Taking of the first category, "White male" and reading across the first line of figures, we find that there are 98,010 "lodger[s] or partner[s]" in New York State. Ms. Smith apparently believes that the figure (and the parallel figures for "White female," "Negro male," etc. appearing on Table 153) represents the number of lodger-partners living with White male heads of households. It does not. Rather, it represents the number of White male lodger-partners in New York. As shown by facts of the Hurley and D'Alessio claims, it cannot be assumed that all White male lodgers live with White male heads of households.

** Mr. Bickel's use of irregular intervals on the horizontal axis of his graph (A. 251) gives a distorted appearance to the relationship between median income (horizontal axis) and percentage of renter households (vertical axis) (A. 251).

census Table A-2 (A. 253)* and graphed by appellants together with the information provided by Mr. Bickel. The graphs appear as Exhibits "1" and "2" to this Reply brief.**

Appellees' characterization of the existing New York shelter allowance program as providing "one shelter allowance" for the "number of persons in the household who are eligible for public assistance" without regard to whether or not the beneficial use of the dwelling is shared and without regard to the actual cost or maximum allowed rent for the dwelling involved is error (appellees' brief, p. 20) and reveals that their purpose in these actions is not to insure that the individual shelter needs of public assistance recipients are met but to convert the existing

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* That the data for multi-person units below $80 monthly rentals can be derived from census Table A-2 (A. 253) is illustrated by the following example: Looking at the 5th vertical column on the census table, $70-79 monthly rental, and proceeding down the column, we find that the total number of such units is 199,356 and that the number of single person units in that category is 76,178. Subtracting the single person units from the total, we find that there are 123,178 multi-person units in the $70-79 category. Continuing down the 5th column, we find that the number of crowded units (1.01-1.50 persons per room) with plumbing in the category is 15,762, and the number of such "crowded units" without plumbing is 307, making a total 16,069 crowded multi-person units at $70-79 monthly, or 13% of total number of multi-person units in that category. There are 5,568 "very crowded" multi-person units (1.51 or more persons per room), or 4.5% of the total number of $70-79 multi-person units. The same procedure can be followed for the 2nd (less than $50 monthly), 3rd ($50-$59 monthly) and 4th ($60-$69 monthly) vertical columns, and the results graphed as set forth in Exhibits "1" and "2" hereto.

** Appellants regraphed the Bickel data with regular intervals on the horizontal axis to avoid distortion and with "multi-person units" rather than "renter households" on the vertical axis since, as Mr. Bickel concedes, the grouping of single person units with multi-person units into "renter households" has a "masking effect" on crowding (A. 247). Appellants have also graphed the amount of rent (in addition median income) in relation to multi-person units. Exhibit "2."

program into one providing flat shelter grants.* They cite no federal authority in support of their position, and indeed, there is none. HEW permits but does not mandate such grants, and continues to recognize pro-ration of shelter costs as a means of assessing individual shelter needs. See *Guidelines of Development of Consolidated AFDC Assistance Standards, id.*, providing instructions on "fair averaging" for flat grants and noting that states that change to flat grants are, *inter alia*, " 'averaging away' differences caused by . . . prorating of shelter costs between recipients and non-recipients in a household" (p. i-1), thereby admitting that pro-ration of shelter cost remains a valid means of assessing needs in states like New York which do not have "flat" all purpose grants or "flat" shelter grants. Compare *Hausman* v. *Department of Institutions and Agencies*, 314 A. 2d 362, cert. denied 94 S. Ct. 3083

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* As illustrated by the combination of their claims in these actions with their demand for preliminary injunctive relief in *Nero* v. *Lavine, supra*, appellees appear to desire flat grants at the per person or assistance family maximums. See p. 17, *ante*. This is wholly inappropriate. Maximums operate under programs where varying amounts are payable up to a ceiling. While it is true that under such a program, any recipient may obtain the maximum if he can show a need for it, it is equally true that not all the recipients obtain the maximum. Under a flat grant system, the amount of the flat grant is fixed at the "fair average" of the payments in a defined category, never at the maximum in the category. Under such a system, no recipient can obtain the maximum even if he needs it, or obtained it under a prior, variable ssytem. See *Guidelines for Development of Consolidated AFDC Assistance Standards*, HEW 1974. That the fair averaging method employed in flat grants tends to disadvantage more (approximately half) of the caseload than a variable system with maximums (which generally disadvantages no more than 5% of the caseload) is recognized in *Abramowitz* v. *Lavine*, 74 Civ. 1773, E.D.N.Y., commenced on December 17, 1974, wherein SSI beneficiaries in effect seek to return to or additional eligibility for state assistance contending in part that the basic "flat" grant for food, clothing and incidentals plus the variable shelter allowance would provide them with more funds than they receive under SSI.

(1974); *Roselli* v. *Affleck*, 373 F. Supp. 36 (D.R.I. 1973), aff'd —— F.2d ——, No.74-1084 (1st Cir. Dec. 31, 1974).*

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* Appellees' position that HEW has disapproved the non-paying lodger provision of § 352.30(d) or remains equivocal about its validity is frivolous. Appellees' brief, pp. 45-46, 1b-6b. Although it appears that Commissioner Smith's position on § 352.30(d) was somewhat unclear on September 21, 1972 (appellees' brief pp. 5b-6b), it is plain that the same Commissioner Smith specifically approved the same regulation on January 15, 1974 (A. 155-156, 622-623). Miss Catherine Miller's comments (appellees' brief pp. 45-46, 1b-3b), added by counsel for appellees after the record below was closed, show only that some states whose regulations were approved computed the lodger's shelter share on the basis of a scheduled or assumed value whereas the New York regulation computed it on the basis of his fractional share of actual cost.

2. The non-paying lodger provision of § 352.30(d) does not violate the recipients' rights to privacy and free association.

As every court that has heard these actions has recognized, § 352.30(d) does not prescribe familial life styles, sexual habits or any other matter which this Court has found to come within protected zones of privacy and free association. See e.g., *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); *Roe* v. *Wade*, 410 U.S. 113 (1973); *Griswold* v. *Connecticut*, 381 U.S. 254 (1970).

Since recipients are entitled to no more than their own shares of shelter, the non-paying lodger provision of § 352.30(d) properly determines whether a non-recipient is sharing a dwelling with a recipient and the amount of his share of shelter cost. It does not prevent the recipient from sharing the dwelling with a lodger, it simply prevents the recipient from charging the cost of her choice to public funds, and "nothing of a constitutional magnitude is involved." *Wyman* v. *James*, 400 U.S. 309, 324 (1971).

Even if appellees' view is accepted and a strict equal protection test is applied, the non-paying lodger provision of § 352.30(d) achieves a "perfect congruence" with the legitimate state interests involved in the payment of public assistance funds only to meet the needs of qualified recipients by necessary and "least drastic" means. Appellants' main brief, pp. 53-54, 60. Compare *Russell* v. *Carleson*, 36 Cal. App. 3d 334, 111 Cal. Rptr. 497 (Court of Appeals 1974), sustaining the application of criminal penalties when the lodger fails to pay his share.

CONCLUSION

For the foregoing reasons and those set forth in appellants' main brief, the judgment and order of the District Court in No. 74—543 should be reversed and the decision of the Second Circuit in No. 74—5054 should be affirmed. Alternatively, the judgment and order of the District Court in No. 74—453 should be vacated and the cause remanded to the District Court for further proceedings.

Dated: New York, N.Y., March 21, 1975.

Respectfully submitted,

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* The Attorney General gratefully acknowledges the co-operation of Kenneth L. Siegal in the preparation of the statistical analyses presented herein.

EXHIBIT "1"

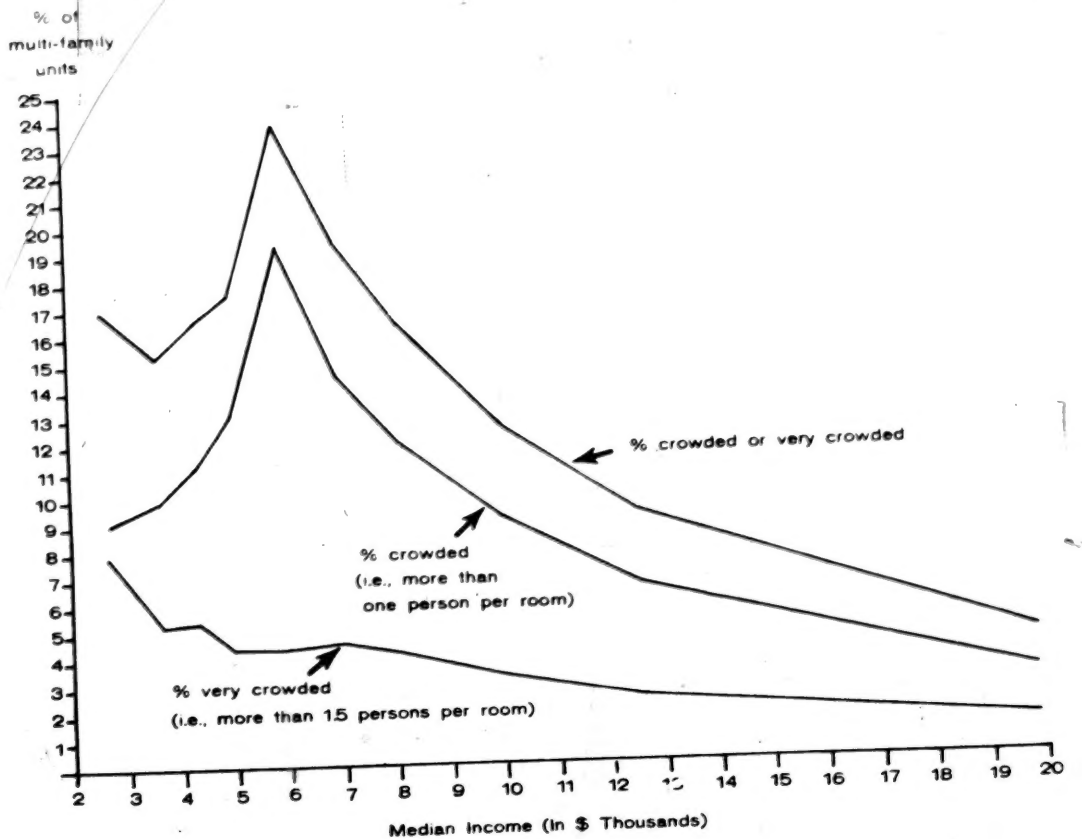
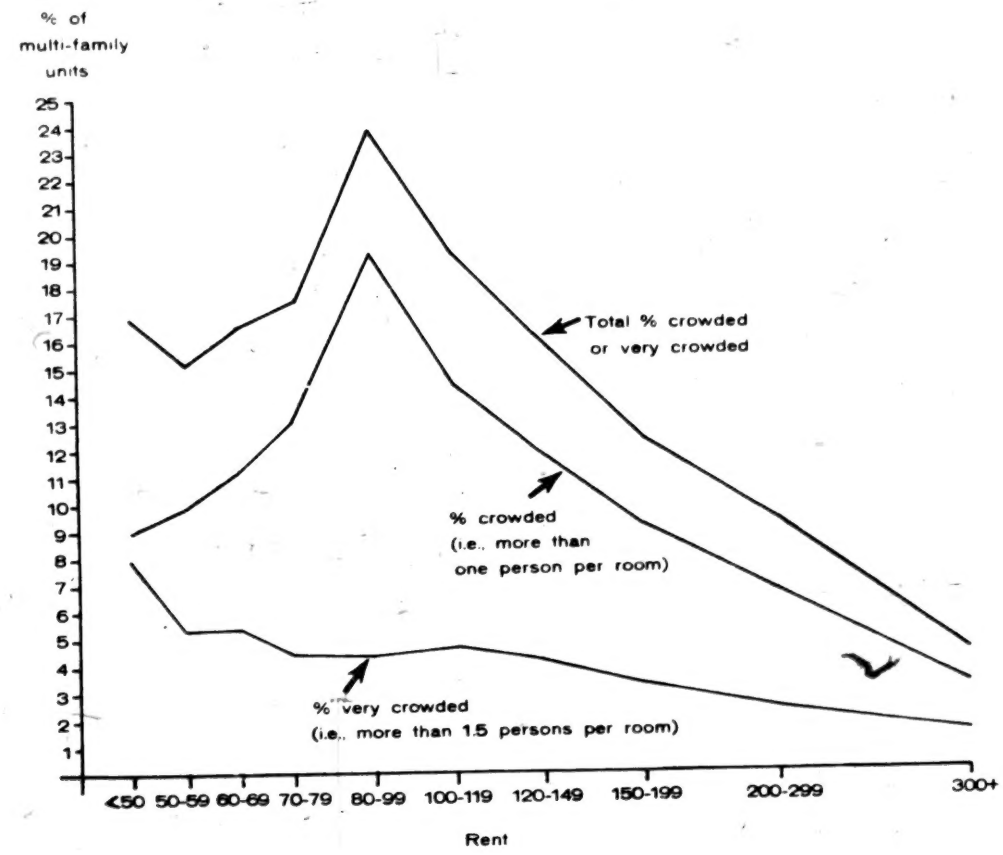

% of multi-family units
25
24
23
22
21
20
19
18
17
16
15
14
13
12
11
10
9
8
7
6
5
4
3
2
1
% crowded or very crowded
% crowded
(i.e., more than
one person per room)
% very crowded
(i.e., more than 1.5 persons per room)
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20
Median Income (In $ Thousands)

EXHIBIT "2"


% of multi-family units
25
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18
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16
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14
13
12
11
10
9
8
7
6
5
4
3
2
1
Total % crowded or very crowded
% crowded (i.e., more than one person per room)
% very crowded (i.e., more than 1.5 persons per room)
<50
50-59
60-69
70-79
80-99
100-119
120-149
150-199
200-299
300+
Rent